Will Copyright Protection Last Forever?

by Pamela Winston Bertani

It's known by some as *copyright creep* – the incremental extensions of copyright protection that have occurred over the past century. The Copyright Term Extension Act of 1998 (CTEA), which is currently at issue in the case of *Eldred v. Ashcroft*, is but the latest in a series of Congressional extensions of the copyright term. Last Tuesday, February 25th, the United States Supreme Court granted certiorari to hear *Eldred v. Ashcroft*, a case challenging the constitutionality of the CTEA and stirring up serious debate over whether more, or less, protection best achieves the Congressional mandate "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The CTEA's original proponent was the late Congressman Sonny Bono. After his death in 1998 his widow, Mary Bono, succeeded to the House of Representatives seat and continued pursuing Bono's copyright campaign to extend the term of protection. Prior to the CTEA, the term of copyright protection as set forth in the amended Copyright Act of 1976 (17 U.S.C. § 101 *et seq*.), was for the life of the author plus 50 years after his or her death, and 75 years for corporations. The CTEA amends various provisions of the Copyright Act and extends the copyright protection term for an additional 20 years as follows: (1) the terms of copyright protection is extended to the life of the author plus 70 years for works that were created in or after 1978, and to which an individual currently holds the copyright; (2) for a work created in 1978 or later that is anonymous, or pseudonymous, or is made for hire, the term is extended from 75 to 95 years from the year of publication or from 100 to 120 years from the year of creation, whichever occurs first; and (3) for a work created before 1978, for which the initial term of copyright was 28 years, the renewal term is extended from 47 to 67 years, thereby creating a combined term of 95 years. In all three situations the CTEA applies retrospectively since it extends the terms of subsisting copyrights. According to the Court of Appeals for the District of Columbia Circuit, the above-stated term extensions better aligns United States copyright protection with the protection available in the European Union.

The named plaintiff in *Eldred v. Ashcroft* is Eric Eldred, who runs a free Internet library that offers the text of about 50 classic books, poems, and essays that are in the public domain. He and the other plaintiffs, including corporations, associations and other individuals, rely upon public domain work for their livelihood through either publishing or online posting. Collectively they contend that Congress exceeded its constitutional authority by again extending copyright protection terms – Congress has extended the term of copyright protection a total of 11 times in the past century. Plaintiffs argue further that the CTEA is beyond Congress' power and therefore unconstitutional for three primary reasons: first, the CTEA, in both its prospective and retrospective applications, fails the intermediate scrutiny appropriate under the First Amendment; second, in its application to preexisting works, the CTEA violates the originality requirement of the Copyright Clause; and third, in extending the term of subsisting copyrights, the CTEA violates the "limited Times" requirement of the Copyright Clause.

The D.C. Circuit disagreed. According to the Court, the regime of copyright itself respects and adequately safeguards the freedom of speech protected by the First Amendment. Copyright law recognizes that an "idea/expression dichotomy" strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of *facts* while still protecting an author's *expression*. On the originality issue, the Court found that plaintiffs mistakenly read the Supreme Court's ruling in *Feist Publications v. Rural Telephone Service Co.* too broadly, and interpreted that case as meaning that a work already in the public domain lacks the originality required to qualify for copyright protection. The Court explained further that the issue in this respect is *not* whether a particular work qualifies for copyright protection – indeed, the relevant works are already copyright protected – the real issue is whether copyright protection may by statute be continued in force beyond the renewal term specified by the law in existence when the copyright was first granted. Thus, plaintiffs' argument missed the mark because originality is by its nature a threshold inquiry relevant to copyrightability, not a continuing concern relevant to Congress' authority to extend the copyright protection term. Finally, with respect to plaintiffs' argument that pursuant to the Constitution, copyright protection is to endure only for "limited Times", the Court agreed that if Congress were to make copyright protection permanent then it would surely exceed its power under the Copyright Clause. However, the Court found that applying the "limited Times" language to the Copyright Clause preamble does not constitute a substantive limit on Congress' power to extend copyright protection.

According to Stanford Law School Professor Lawrence Lessig, lead counsel for Eldred, by repeatedly extending the terms of existing copyright protection – as it has eleven times in the past forty years – Congress has adopted a practice that defeats the Framers' plan by which Congress is obligated to limit reasonable copyright terms in order to stimulate new creative work. Daniel Bromberg, a Washington partner for Jones, Day, Reavis & Pogue, represents sheet music companies and film restorers that use public domain work. Bromberg, who agrees with Lessing that the Bono bill is contrary to the Framers' intent, believes that "[t]he purpose of copyright power was not just to encourage existing authors, but also to create a public domain that would provide a source of enjoyment for the public and a source of inspiration to future authors and artists." Conversely, book publishers, music companies, and the heirs of copyright holders say that the law does not overreach and that its added intellectual property protection is beneficial.

Many commentators characterize the Supreme Court's decision to hear the case as a surprise move – one that is likely to generate a wave of amicus briefs from corporations that want to keep the law on the books. A decision in this case is expected later this year.